91-1133

Supreme Court, U.S.
FILED
JAN 8 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HAYDEN LEIGH SILETS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

HARVEY M. SILETS
Counsel of Record
SILETS & MARTIN, LTD.
140 South Dearborn Street
Suite 1500
Chicago, Illinois 60603
(312) 263-5800
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Is mere reliance on government affidavits and refusal to conduct an *in camera* inspection a sufficient District Court *de novo* review of denial of a Freedom of Information Act request seeking portions of ten documents of public interest relating to Jam s R. Hoffa and potential government illegalities?

2. Does the judicially created burden of demonstrating governmental bad faith as a prerequisite for *in camera* review of documents under the Freedom of Information Act violate the legislative purpose of the Act?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Hayden Leigh Silets, and the Respondent, the United States Department of Justice.

The Respondent before this Court is the United States Department of Justice.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	13
REASONS FOR GRANTING THE WRIT:	
I.	
THE FREEDOM OF INFORMATION ACT'S MANDATE THAT THE DISTRICT COURT DETERMINE *DE NOVO* WHETHER WITHHELD PORTIONS OF DOCUMENTS ARE EXEMPT FROM DISCLOSURE CANNOT BE SATISFIED MERELY BY RELYING ON THE GOVERNMENT'S AFFIDAVITS AND WITHOUT BALANCING THE PUBLIC AND PRIVATE INTERESTS AT STAKE	16
II.	
A JUDICIALLY CREATED REQUIREMENT THAT A PARTY SEEKING DISCLOSURE OF GOVERNMENT DOCUMENTS AND *IN CAMERA* REVIEW OF WITHHELD PORTIONS OF DOCUMENTS SHOW EVIDENCE OF GOVERNMENT BAD FAITH CONTRAVENES THE PURPOSE AND STATUTORY SCHEME OF THE FREEDOM OF INFORMATION ACT	21
CONCLUSION	25

APPENDIX

	App. Page
Silets v. United States Department of Justice, 945 F.2d 227, 233 (7th Cir. 1991) (*en banc*)	1
Letter from Richard L. Huff, Co-Director, Office of Information and Privacy to Jack S. Craven of Silets and Martin, Ltd., Denying Administrative Appeal	15
Order of the United States District Court, December 2, 1988, Dismissing Case with Leave to Reinstate or Substitute	17
Order of the United States District Court, December 20, 1988, Reinstating Case	18
Order of the United States District Court, September 6, 1989, Denying Plaintiff's Motion for Production of Documents and *In Camera* Review of Documents	19
Order of the United States District Court, September 6, 1989, Denying as Moot Plaintiff's Motion for Affidavit	21
Order of the United States District Court, September 6, 1989, Denying Plaintiff's Motions to Reconsider	22
Order of the United States District Court, November 15, 1989, Overruling Plaintiff's Objections to Recommendation of Magistrate W. Thomas Rosemond, Jr.	23
Order of the United States District Court, November 17, 1989, Status Hearing Held; Case Dismissed	24
Declaration of L. Jeffrey Ross	25
Declaration of Angus B. Llewellyn	33

TABLE OF AUTHORITIES

Cases	PAGE
Church of Scientology, Etc. v. Department of the Army, 611 F.2d 738 (9th Cir. 1980)	19, 22
Cowles Communications, Inc. v. United States Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971)	16
Department of Air Force v. Rose, 425 U.S. 352 (1976)	16, 17, 19, 21, 22
Diamond v. Federal Bureau of Investigation, 707 F.2d 75 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984)	19
Ely v. Federal Bureau of Investigation, 781 F.2d 1487 (11th Cir. 1986)	17, 18, 20, 22, 23
EPA v. Mink, 410 U.S. 73 (1973)	21, 22
Ferri v. Bell, 645 F.2d 1213, 1221 (3d Cir. 1981), *modified by* 671 F.2d 769 (3d Cir. 1982)	16, 24
John Doe Government Agency v. John Doe Corp., 493 U.S. 146 (1989), *rehearing denied*, 493 U.S. 1064 (1990)	18
Lamont v. Department of Justice, 475 F. Supp. 761 (S.D.N.Y. 1979)	16
Lesar v. Department of Justice, 636 F.2d 472 (D.C. Cir. 1980)	17
Lykins v. Department of Justice, 725 F.2d 1455 (D.C. Cir. 1984)	19
Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976)	24
Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982)	24
Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978)	23, 24

Silets v. United States Department of Justice, 945 F.2d 227 (7th Cir. 1991) (*en banc*) 19, 22, 23, 24

Stephenson v. Internal Revenue Service, 629 F.2d 1140 (5th Cir. 1980) 17, 18, 20, 22

United States Department of Justice v. Reporter's Committee for Freedom of the Press, 489 U.S. 749 (1989) 21, 24

United States Department of State v. Ray, 112 S. Ct. 541 (1991) 23, 24

United States v. Allen, 798 F.2d 985 (7th Cir. 1986) 18, 20

Constitutional and Statutory Provisions

5 U.S.C. § 552 13

5 U.S.C. § 552(a)(4)(B) 18, 23

5 U.S.C. § 552(b)(7)(C) 17

5 U.S.C. § 552(b)(6) 17

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 13

Textbooks, Legislative Histories, and Other Government Documents

Note, *In Camera Inspection Under the Freedom of Information Act*, 41 U. Chi. L. Rev. 557 (1974) 24

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) .. 21

S. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6267 (Conference Report) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HAYDEN LEIGH SILETS,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Hayden Leigh Silets, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 10, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, *en banc*, (Cudahy, J. and Cummings, J., dissenting) which appears in the Appendix hereto, App. 1, *infra*, is reported at 945 F.2d 227 (7th Cir. 1991) (*en banc*).

The United States District Court for the Northern District of Illinois dismissed Petitioner's action without opinion. Its order is reprinted in the Appendix hereto, App. 24, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, was entered on October 10, 1991, affirming an opinion of the United States District Court for the Northern District of Illinois dated November 17, 1989. No petition for rehearing was sought.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Regis-

ter when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the

government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter *de novo*: *Provided*, That the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such

a case the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98-620, Title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357]

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the

responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave

no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of,

or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public,

except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost,

fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under the Freedom of Information Act, 5 U.S.C. § 552, and under 28 U.S.C. § 1331 (general federal question jurisdiction).

This litigation is grounded in Petitioner Hayden Leigh Silets' efforts to obtain the disclosure of documents and other information from the federal government under the Freedom of Information Act relating to the federal government's investigations of the late labor leader, James R. Hoffa. Petitioner's interest in Hoffa began as a research project for his history thesis at Princeton University. As an outgrowth of this project, Petitioner intends to write a book, the subject of which will focus on the questionable legality of the government's investigation of Hoffa and the Teamsters Union.

Petitioner first requested information from the Respondent, the United States Department of Justice, in the summer of 1984. Petitioner sought documents and information relating to the government's electronic surveillance of Hoffa and others associated with Hoffa during the period October, 1962 through March, 1964, during which

time Hoffa was a criminal defendant on trial before the District Court in Chattanooga, Tennessee. Petitioner did not receive a response to his Freedom of Information Act request for over three and one-half years. In February of 1988, ten documents were released. Five of these documents were edited. Petitioner filed an administrative appeal objecting to the nature of the government's compliance with his requests within the required thirty days. That administrative appeal was denied on June 30, 1988. *See* Appendix at App. 15.

This action was filed in the United States District Court for the Northern District of Illinois, Eastern Division, in August, 1988. On December 2, 1988, the action was dismissed with leave to reinstate based upon Respondent's representations to Petitioner and the District Court that additional records would be produced. *See* Appendix at App. 17. In December of 1988, six additional documents were released. Five of the six newly released documents were edited and the other document alluded to an "attachment" that was, without explanation, missing from the produced documents. The District Court reinstated the action at Petitioner's request on December 20, 1988. *See* Appendix at App. 18.

The reinstated litigation centered on the redactions in the released documents and whether Petitioner was entitled to the missing attachments. Petitioner asked the District Court to: (1) conduct an *in camera* review of the edited documents to determine whether Respondent was properly applying the various exemptions to disclosure provided in the Freedom of Information Act and (2) require Respondent to describe with specificity in a sworn affidavit the procedures followed to attempt to locate the missing attachments. Two affidavits were ultimately forthcoming—one from L. Jeffrey Ross, Chief of the Freedom

of Information/Privacy Act Unit for Respondent and one from Special Agent Angus B. Llewellyn of the Federal Bureau of Investigation. *See* Appendix at App. 25 and App. 33. The affidavits purported to justify the redactions made in the records released to Petitioner and explained the procedures followed to locate the missing attachments and the purpose of the exemptions.

The Magistrate, to whom the case had been referred by the District Court Judge, relied on the government's affidavits to conclude the redacted portions were exempt and denied Petitioner's motion for *in camera* review on September 6, 1989. *See* Appendix at App. 19. At that time, the Magistrate also denied Petitioner's motions for an affidavit and for reconsideration. *See* Appendix at App. 21 and App. 22. Petitioner filed objections to the Magistrate's findings with the District Court. The Respondent did not file a response to the objections. On November 15, 1989, the District Court overruled Petitioner's objections. *See* Appendix at App. 23. The action was dismissed without opinion on November 17, 1989. *See* Appendix at App. 24.

On January 10, 1990, Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit. The original panel opinion was circulated to all members of the Seventh Circuit in light of an assertion in a proposed dissent that the original opinion conflicted with another Seventh Circuit case. *See* Appendix at App. 2. The active members of the Seventh Circuit then voted to reconsider the case *en banc*. The District Court decision was affirmed over the dissenting opinion of two Judges. Thus, no hearing or *in camera* review was ever conducted whereby the District Court could independently review whether the redactions in the requested documents clearly fell within the Freedom of Information Act exemptions.

REASONS FOR GRANTING THE WRIT

I.

THE FREEDOM OF INFORMATION ACT'S MANDATE THAT THE DISTRICT COURT DETERMINE *DE NOVO* WHETHER WITHHELD PORTIONS OF DOCUMENTS ARE EXEMPT FROM DISCLOSURE CANNOT BE SATISFIED MERELY BY RELYING ON THE GOVERNMENT'S AFFIDAVITS AND WITHOUT BALANCING THE PUBLIC AND PRIVATE INTERESTS AT STAKE

The District Court relied on and accepted the government's assertions in two affidavits that the material removed from the released documents was either "outside the scope" of Petitioner's inquiry or exempt from disclosure pursuant to the exemption provisions of the Freedom of Information Act. This unquestioning reliance conflicts with the touchstone of any proceeding under the Freedom of Information Act, which is to ensure the fullest possible disclosure. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *see also Ferri v. Bell*, 645 F.2d 1213, 1221 (3d Cir. 1981), *modified by* 671 F.2d 769 (3d Cir. 1982). The Act in no way requires the District Court to accord special deference to an agency's exemption determination:

> Congress did not intend the Court passively to accept even the most sincerely advanced agency statements without having a factual basis supporting the claimed exemption.

Ferri, supra, 645 F.2d at 1222 n.11 (*quoting Lamont v. Department of Justice*, 475 F. Supp. 761, 768 (S.D.N.Y. 1979)); *see also Cowles Communications, Inc. v. United States Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971) (affidavits should not foreclose any other determination of fact). The Act's *de novo* review requirement plainly indicates that a private citizen's statutory right to government documents cannot be guaranteed if the government

decides what to disclose. Once it is determined that the documents exist and that the documents have been withheld under the privacy exemptions, the Court must take on an activist role, otherwise, the government will become the final arbiter of whether a document is privileged from disclosure. *See, e.g., Stephenson v. Internal Revenue Service*, 629 F.2d 1140 (5th Cir. 1980); *Ely v. Federal Bureau of Investigation*, 781 F.2d 1487 (11th Cir. 1986); *Rose, supra*, 425 U.S. 352.

The Seventh Circuit's affirmance of the District Court's determination conflicts with case law construing the court's obligation under the Freedom of Information Act. The opinion rendered by the Magistrate, appointed by the District Court, reveals that he relied solely on the government's assertions in its affidavits. In the affidavits explaining why portions of the documents were withheld, the government invokes the privacy exemptions, 5 U.S.C. §§ 552(b)(6) and (b)(7)(C). One affiant expressed his view that after balancing the interests, no public interest existed in the withheld documents while the other affiant merely stated in a conclusory fashion that disclosure would invade the personal privacy of the subjects. *See* Declaration of L. Jeffrey Ross, paragraphs 5-9 (without attached exhibits), Appendix at App. 27-30; Declaration of Angus B. Llewellyn, paragraphs 10-12 (without attached exhibits), Appendix at App. 37-38. The Magistrate's opinion does not reveal that he made the necessary independent determination that the documents could properly be withheld under the Freedom of Information Act or balanced the public and private interests at stake. *See* Appendix at App. 19-20. When the government relies on the privacy exemptions to justify non-disclosure, a District Court must "balanc[e] the privacy interests at stake against the public interests in disclosure." *Lesar v. Department of Justice*, 636 F.2d 472, 486 (D.C. Cir. 1980); *see also United States*

Department of State v. Ray, 112 S. Ct. 541, 548 (1991) (to determine whether the government has met its burden of justifying redactions made under the privacy exemptions, the statute requires the court to balance the private interests against the Act's policy of exposing agency action to the public); *Ely*, *supra*, 781 F.2d at 1491-92. The purpose of the balancing is to ensure that "indiscriminate" secrecy is not allowed. *Cf. John Doe Government Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989), *rehearing denied*, 493 U.S. 1064 (1990). The District Court's mere reliance on affidavits asserting that the privacy interests outweigh the public interests permits the government to engage in indiscriminate secrecy and amounts to the court's abdication of its power to the executive branch. A proper balancing requires more active participation by the Court in making its *de novo* determination.

To make a *de novo* determination and evaluate the bona fides of an agency's claims of exemption, the District Court has available to it the ability to conduct an *in camera* review. *See* 5 U.S.C. § 552(a)(4)(B). Although *in camera* review is discretionary, "in many situations it will be plainly necessary and appropriate." *See Stephenson*, *supra*, 629 F.2d at 1144 (*quoting* S. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6267, 6287-88 (Conference Report)). Several circumstances in this case, and in many other Freedom of Information Act cases, make *in camera* review the necessary mechanism by which the District Court should balance the interests.

First, Petitioner seeks documents over a quarter of a century old. A balancing of the interests must be independently undertaken by the court to test the sincerity of the government's assertion of privilege on privacy grounds in cases where privacy interests may no longer be at stake. "The need for *in camera* review to make

[a] determination is particularly strong in a case . . . in which the documents are over two decades old, since many of the individuals ostensibly protected by [the privacy exemptions] have likely 'waived their privacy interests through death or public disclosure.' " *Silets v. United States Department of Justice*, 945 F.2d 227, 233 (7th Cir. 1991) (Cudahy, J. and Cummings, J., dissenting) (*quoting Diamond v. Federal Bureau of Investigation*, 707 F.2d 75, 77 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984)). Appendix at App. 12.

Second, the documents Petitioner seeks may reveal the potential illegal activity of the government. Disclosure of the documents would fulfill the Freedom of Information Act's basic purpose to open agency action to the light of public scrutiny. *See, e.g., Rose, supra*, 425 U.S. at 372. "Since potentially illegal activity of the government is itself the subject of the investigation, an *in camera* review may be crucial to an objective decision as to the proper disclosure required by [the Freedom of Information Act]." *Silets, supra*, 945 F.2d at 234 (Cudahy, J. and Cummings, J., dissenting). Appendix at App. 13.

Finally, Petitioner requests review of portions of only ten documents. In those instances where the court must conduct a balancing of the interests involved and where the review of a relatively small number of documents would be required, the Court should exercise its "inspection prerogative." *See Church of Scientology, Etc. v. Department of the Army*, 611 F.2d 738, 743 (9th Cir. 1980); *cf. Lykins v. Department of Justice*, 725 F.2d 1455, 1464 (D.C. Cir. 1984) (Court held that statutory requirements had been met where the agency had released most of the contents of a document, provided a public statement that the remaining portions would reveal confidential source and an *in camera* review of the excised portions had been conducted by the District Court).

The Seventh Circuit opinion also conflicts with case law making a clear distinction between those instances where an affidavit alone would be sufficient and where a more active role by the District Court is required. In those instances where the government cannot find the documents, the District Court is unable to do anything more than take the government at its word. An affidavit, then, may appropriately be relied upon. *Ely, supra*, 781 F.2d at 1491-92; *Stephenson, supra*, 629 F.2d at 1145. However, where the agency has found the documents and refuses to produce all or a portion of them, the District Court must require more than the government's self-serving statements in order to fulfill the intent of the Act. *Id.*

> . . . [i]nstances where it is determined that records do exist, the District Court must do something more to assure itself of the factual basis and bona fides of the agency's claim of exemption than rely solely upon an affidavit. . . .

Stephenson, supra, 629 F.2d at 1145. Reliance on affidavits cannot satisfy the court's obligations under the Act and the court must exercise other options, which include the power to conduct an *in camera* review. *See Ely, supra*, 781 F.2d 1491; *cf. United States v. Allen*, 798 F.2d 985, 995-96 (7th Cir. 1986) (Addressing the Jencks Act, the court stated that "while the District Court may be able, . . . to rely on the government assertion that a requested document does not exist, the court cannot rely on a government assertion that a document does not 'relate to' the subject matter of the witness's testimony and should not rely on its assertion that the document does not fit the statutory definitions of 'statement.' To do so would defeat the underlying intent of the . . . Act.").

Allowing the District Court to rely on the government's affidavits without making an independent finding that the

documents are exempt or conducting a balancing of the privacy and public interests at stake permits the government to act both as an advocate and determiner of fact. This turns the Freedom of Information Act on its head. The District Court, not the government, must be the final arbiter of what is and is not discloseable. Thus, in cases where the documents have been found and where the privacy exemptions are involved, the District Court must satisfy its obligation to conduct a *de novo* review by taking a more active role in ascertaining the validity of the government's claims of privilege and make an *in camera* inspection of the documents.

II.

A JUDICIALLY CREATED REQUIREMENT THAT A PARTY SEEKING DISCLOSURE OF GOVERNMENT DOCUMENTS AND *IN CAMERA* REVIEW OF WITHHELD PORTIONS OF DOCUMENTS SHOW EVIDENCE OF GOVERNMENT BAD FAITH CONTRAVENES THE PURPOSE AND STATUTORY SCHEME OF THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act reflects Congress' recognition that public exposure to the activities of its government via disclosure of government documents was, and is, essential if private citizens are to learn what their government is up to. *United States Department of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*quoting EPA v. Mink*, 410 U.S. 73, 80 (1973) (Douglas, J., dissenting)). Thus, the Act creates a strong presumption always in favor of disclosure. *See Department of Air Force v. Rose*, 425 U.S. 352, 360, 362 (*relying on* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). To further the Act's purpose, Congress created a legislative scheme which mandates that the government prove that the documents are exempt from disclosure and requires the courts to determine independently whether

the exemptions relied on by the government are properly applied. *See* 5 U.S.C. § 552(a)(4)(B); *Ely v. Federal Bureau of Investigation*, 782 F.2d 1487, 1490-91 (11th Cir. 1986); *Stephenson v. Internal Revenue Service*, 629 F.2d 1140, 1144-46 (5th Cir. 1980); *Church of Scientology, Etc. v. United States Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1979). "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Rose, supra*, 425 U.S. at 361 (*quoting EPA v. Mink*, 410 U.S. 73, 80 (1973)). *In camera* inspection of disputed records or documents is an indispensable device available to the District Court to prevent government agencies from circumventing the Act's purpose.

In its opinion in this case, the Seventh Circuit stated that a District Court does not abuse its discretion in denying *in camera* review of records when affidavits submitted by the Government " '(1) described the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically with the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of bad faith.' " *Silets v. United States Department of Justice*, 945 F.2d 227, 229 (7th Cir. 1991) (citation omitted). Appendix at App. 3. The Seventh Circuit was concerned that requiring only an assertion of bad faith would "send a signal flare to all future litigants to make certain to allege Government misconduct no matter how unsupported the allegation." *Id.* at 231. Appendix at App. 8. Thus, the Court required that a party seeking disclosure of government documents and requesting *in camera* review to verify the government

claims of exemption must show *evidence* of bad faith. *Id.* at 231. Appendix at App. 8.

A requirement that Petitioner provide evidence of bad faith in order to receive an *in camera* review distorts the legislative scheme of the Freedom of Information Act. Under the Freedom of Information Act, the court, not the government, is the ultimate arbiter of whether a document is privileged from disclosure. *See* 5 U.S.C. § 552(a)(4)(B); *see also Ely, supra*, 781 F.2d at 1490. The agency's input is limited to providing evidence rebutting the Freedom of Information Act's strong presumption that government documents are subject to disclosure. *See United States Department of State v. Ray*, 112 S. Ct. 541, 547 (1991); *Ely, supra*, 781 F.2d at 1490. The Seventh Circuit's bad faith requirement imposes an undue burden on a party seeking disclosure and *in camera* review. The requirement ultimately shifts to Petitioner the burdens of proving that documents, which he has never seen, are not entitled to be privileged, and prompting the court to conduct a responsible evaluation of the government's claimed exemptions, a duty which it is statutorily mandated to do. Moreover, a bad faith requirement ignores the reality that government officials will not deliberately "stoop to misrepresentation, but will possess a natural tendency to resist disclosure." *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978). The tendency will be particularly strong in cases like this one where the documents the private citizen wants disclosed may reveal agency wrongdoing.

The Petitioner seeks disclosure of portions of documents that may reveal improper conduct by Respondent or its agents in its investigation of James Hoffa and the Teamsters Union. The documents produced by the government thus far tend to confirm Petitioner's belief that the government conducted an illegal surveillance of Hoffa and

the Teamsters Union. Disclosure of the redacted portions of the documents will facilitate the public's oversight of the actions of its government and may reveal malfeasance or wrongdoing by government agencies, matters deemed essential to the public interest. *See Pratt v. Webster*, 673 F.2d 408, 424 (D.C. Cir. 1982); *cf. Ray, supra*, 112 S. Ct. at 549 (official information shedding light on an agency's performance of its duties falls squarely within the Act's purpose) (*quoting United States Department of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted)). Clearly, the information Petitioner seeks "strikes at the core of [the Freedom of Information Act's] purpose, involving matters of public importance and implicating the principle of self-government." *Silets, supra*, 945 F.2d at 234 (Cudahy, J. and Cummings, J., dissenting). Appendix at App. 13.

The Freedom of Information Act in no way suggests that *in camera* review depends upon a showing of bad faith. The Act more properly requires only that a party seeking disclosure make a reasonable showing that the disputed documents are of interest to the public, that the government has incentive to withhold either deliberately, or inadvertently, portions of documents that may expose its wrongdoing, and that an actual dispute exists as to the factual nature of the documents. *See, e.g., Ferri v. Bell*, 645 F.2d 1213, 1225 (3d Cir. 1981) (*citing* Note, *In Camera Inspection Under the Freedom of Information Act*, 41 U. Chi. L. Rev. 557, 565, 581 (1974)), *modified by* 671 F.2d 769 (3d Cir. 1982); *Ray, supra*, 587 F.2d at 1212 (Skelly Wright, J., concurring); *Phillippi v. CIA*, 546 F.2d 1009, 1012-13 (D.C. Cir. 1976) (stating that the Freedom of Information Act "contemplates that courts will resolve fundamental issues in contested cases on the basis of *in camera* examinations of the relevant documents")). That

showing is enough to suggest government motives, innocent or not, to withhold information, thereby making *in camera* review necessary to test the accuracy of the government's representations. To require Petitioner to show more defeats the purpose and legislative scheme of the Freedom of Information Act.

CONCLUSION

For each of the foregoing reasons, the Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit to resolve the questions presented herein.

Respectfully submitted,

HARVEY M. SILETS
Counsel of Record
SILETS & MARTIN, LTD.
140 South Dearborn Street
Suite 1500
Chicago, Illinois 60603
(312) 263-5800

Attorney for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1069

HAYDEN LEIGH SILETS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 7343—**Marvin E. Aspen**, *District Judge.*

ARGUED DECEMBER 4, 1990
RECONSIDERATION EN BANC GRANTED
DECIDED OCTOBER 10, 1991

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, requires the Department of Justice ("DOJ") and other Government agencies to make their records available to the public. Various exceptions allow the agencies to keep certain matters secret. In researching a history thesis, Hayden Leigh Silets ("Silets") requested the DOJ to provide records

relating to electronic surveillance of Jimmy Hoffa and his associates from 1962 through 1964. The DOJ complied with the request, but supplied ten documents only in redacted form, claiming the information withheld was exempt from disclosure. Silets filed this action in the District Court requesting *in camera* review of the unedited documents so the Court could determine for itself whether the claimed exemptions applied. The District Court, relying on two Government affidavits, declined to conduct *in camera* inspection and found the edited portions were exempt. In this *en banc* review,[1] we must decide whether the District Court abused its discretion in refusing to examine the records *in camera* before finding the information exempt. We affirm.

FOIA requires the DOJ "upon any request for records which . . . reasonably describes such records . . . [to] make the records promptly available." § 552(a)(3). All records are available to the public unless FOIA specifically exempts them. *Antonelli v. Drug Enforcement Admin.*, 739 F.2d 302, 303 (7th Cir. 1984). The burden is on the agency to prove that any specific documents are exempt. *Id.* The district court determines *de novo* whether the claimed exemptions apply and, in doing so, *may* examine the contents of the records *in camera.* § 552(a)(4)(B); *Carter v. United States Dept. of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987). In deciding whether to conduct *in camera* review, the district court must determine whether such "inspection is needed in order to make a responsible de novo determination on the claims of exemption." *Id.* (citation omitted).

We review a district court's denial of *in camera* review for abuse of discretion. Our Court in *Kimberlin v. Depart-*

---

[1] The original proposed panel opinion was circulated to all active members of the Court pursuant to 7th CIR. R. 40(f), because of an assertion in a proposed dissent that the original opinion conflicted with *Kimberlin v. Department of Treasury*, 774 F.2d 204 (7th Cir. 1985). The majority of all active members voted to reconsider the case *en banc.*

ment of Treasury, 774 F.2d 204, 210 (7th Cir. 1985) held that a district court does not abuse its discretion in denying *in camera* review of records when affidavits submitted by the Government " '(1) describe the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically within the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of bad faith.' " (quoting *Stein v. Department of Justice and Federal Bureau of Investigation*, 662 F.2d 1245, 1253 (7th Cir. 1981)). *See also Terkel v. Kelly*, 599 F.2d 214, 217 (7th Cir. 1979) ("[I]n determining whether the district court erred in refusing to conduct an *in camera* review, the key issue is whether the agency has provided a sufficient description of the contested information to establish that it logically falls within the category of the claimed exemption . . . particularly [where] there is nothing in the record to raise the issue of good faith."), *cert. den.*, 444 U.S. 1013 (1980); *cf. Wright v. Occupational Health & Safety Admin.*, 822 F.2d 642, 646-48 (7th Cir. 1987) (District courts need not either require a detailed *Vaughn* index or conduct *in camera* review of withheld documents when Government affidavits provide sufficient information for the court to evaluate the exemption claims.). Other Circuits have applied tests very similar to ours. *See Lam Lek Chong v. United States Drug Enforcement Admin.*, 929 F.2d 729, 735 (D.C. Cir. 1991) ("*In camera* inspection may be appropriate in two circumstances: when agency affidavits are insufficiently detailed to permit meaningful review of exemption claims, and when evidence of agency bad faith is before the court."); *Vaughn v. United States*, No. 90-1848 (6th Cir. June 21, 1991) (WESTLAW, Cta database); *Lewis v. Internal Revenue Serv.*, 823 F.2d 375, 378 (9th Cir. 1987); *Doherty v. United States Dept. of Justice*, 775 F.2d 49, 52-53 (2d Cir. 1985); *Raven v. Panama Canal Co.*, 583 F.2d 169, 172 (5th Cir. 1978), *cert. den.*, 440 U.S. 980 (1979). *But see Ely v. Federal Bureau of Investigation*, 781 F.2d 1487, 1491-94 (11th Cir. 1986); *Stephenson v. Internal Revenue Serv.*, 629 F.2d 1140, 1145-46 and n. 15-16 (5th Cir. 1980).

A brief review of the redacted documents and the Government's affidavits reveals the withheld information fits logically within the claimed exceptions to disclosure. The materials edited from the records supplied fall into three categories: (1) information withheld to protect the privacy of third parties, (2) information withheld to prevent disclosure of grand jury proceedings, and (3) information withheld to ensure that the identity of FBI informants would not be revealed.

The first class of redacted materials concerns information withheld to protect third parties. Section 552(b)(7)(C) exempts from disclosure "records or information compiled for law enforcement purposes . . . to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." Under this exception, a Government agency may edit the names and identifying information of private parties from documents that otherwise reveal the operations and activities of the agency, because FOIA's central purpose is to guarantee "that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 1482 (1989) (emphasis in original). The first set of information in this case logically falls within this exception. For example, the DOJ withheld the name of an individual who had been wiretapped by the FBI from a two page memo detailing the FBI's surveillance of Hoffa. Similarly, the DOJ withheld the names of those individuals other than Hoffa from a document concerning FBI surveillance of persons with cases pending before the Supreme Court. Another pair of documents is a letter from a high school student requesting information about wiretapping of Hoffa and the DOJ's response to the request. The only information deleted is the name of the student. Also at issue is a memo listing court cases that had been remanded pursuant to the Supreme Court opinion in *Alderman v. United States*, 394 U.S. 165 (1969) (discussing the rights of defendants to have evidence that is

the product of an unlawful surveillance suppressed in a criminal trial). All case names are withheld except for Hoffa's case. The final record redacted on privacy grounds is a memo detailing the FBI's surveillance efforts on 15 individuals. All information is deleted except that relating to Hoffa and his associates.

All of these documents are admittedly records compiled for law enforcement purposes (*see Brant Constr. Co. v. United States Envtl. Protection Agency*, 778 F.2d 1258, 1265 (7th Cir. 1985)), and the DOJ has withheld only the names of and information about private parties unconnected to Silets' request. The redactions in no way hamper the public's understanding of FBI surveillance of Jimmy Hoffa. Therefore, the information withheld on privacy grounds logically fits within the privacy exception in subsection (b)(7)(C). *See Reporters Committee*, 109 S.Ct. at 1480-83; *Miller v. Bell*, 661 F.2d 623, 629-32 (7th Cir. 1981) (noting the substantial privacy interest in keeping the names of individuals secret and the limited impact on the public interest when only identifying information is deleted while other data is disclosed that reveals the entire scope of the agency's activities), *cert. den.*, 456 U.S. 960 (1982).

The next class of redacted materials is the identity of a witness before a grand jury and a discussion of that witness' testimony. Section 552(b)(3) protects matters "specifically exempted from disclosure by statute . . ., provided that such statute . . . requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue . . . ." "The Federal Rules of Criminal Procedure, in turn, prohibit, with exceptions not relevant here, disclosure of 'matters occurring before [a] grand jury.' *Senate of Puerto Rico v. United States Dept. of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987) (quoting FED. R. CRIM. P. 6(e)(2)). Rule 6(e) is a "statute" for purposes of this FOIA exemption. *Id.* at 582 n. 23. Subsection (b)(3) prevents "disclosure [that] would 'tend to reveal some secret aspect of the grand jury's investigation' such . . . as 'the identities of witnesses or . . . the substance of testimony, . . .'" *Id.* at 582 (citation omitted). The DOJ's af-

fidavit demonstrates the redacted information falls squarely within this exception.

The final class of deleted material includes symbol numbers used internally by the FBI to identify confidential sources the disclosure of which could permit someone to identify those sources. The information is withheld under § 552(b)(2), which exempts matters "related solely to internal personnel rules and practices of an agency." "The means by which the FBI refers to informants in its investigative files is a matter of internal significance in which the public has no substantial interest. These symbols bear no relation to the substantive contents of the records released . . . ." *Lesar v. United States Dept. of Justice*, 636 F.2d 472, 485-86 (D.C. Cir. 1980) (footnote omitted). Subsection (b)(2) exempts this material. *Id.*; *Kiraly v. Federal Bureau of Investigation*, 728 F.2d 273, 276 n. 6 (6th Cir. 1984); *cf. Scherer v. Kelley*, 584 F.2d 170, 175 (7th Cir. 1978) (Subsection (b)(2) protects matters such as administrative markings and file numbers.), *cert. den.*, 440 U.S. 964 (1979). Additionally, subsection (b)(7)(D) protects investigatory records compiled for law enforcement purposes from disclosure that could reasonably be expected to reveal "the identity of a confidential source . . . which furnished information on a confidential basis." The Government's affidavit adequately describes how the disclosure of symbol numbers could lead to the revelation of the sources. *See Terkel*, 599 F.2d at 218. So subsection (b)(7)(D) provides an alternative exemption protecting against the disclosure of the sources. *See also Stein*, 662 F.2d at 1259-61; *Scherer*, 584 F.2d at 176-77.

If we are to apply our rule announced in *Kimberlin*, the District Court did not abuse its discretion in denying *in camera* review. The Government's description of the withheld information demonstrates that it logically falls within the claimed exemptions. Because the Government's affidavits are uncontroverted and there is no evidence of bad faith, *Kimberlin* requires affirmance. Silets' only hope is to distinguish *Kimberlin*.

We recognize that the number of documents sought in *Kimberlin* was larger than the number sought here. In *Kimberlin*, there were sixty-four pages of withheld records, while Silets seeks review of ten documents that have been partially redacted. But the District Court, not the Court of Appeals, is in the best position to evaluate the work involved to determine whether *in camera* review will unreasonably drain the Court's resources. Ironically, review in the current case might require *more* work than would have been required in *Kimberlin*. Silets seeks essentially word-by-word review by the District Court—a name here, a description of testimony there, a symbol somewhere else. This piecemeal review may well be more burdensome than a review of hundreds of pages that stand or fall together.

We also recognize that the petitioner in *Kimberlin*, unlike Silets, had not made a formal request for *in camera* review before the District Court. But our Court did not view this distinction as important to its decision. After noting that no formal request had been made, we wrote, "*At any rate, in camera* review of documents is discretionary, and there was no abuse of discretion here." *Kimberlin*, 774 F.2d at 210 (emphasis added) (citation omitted). There is not one hint in *Kimberlin* that the rule adopted is limited only to those cases where a formal request has not been made.

Silets instead relies primarily on the fact that he has alleged wrongdoing by the DOJ and the FBI. He argues that to deny *in camera* review when Government wrongdoing is alleged is to allow "the fox to guard the henhouse." Brief of Appellant at 9. But allegations of Government misconduct persisted in *Kimberlin* as well. One of the documents sought in that case was described in a Government affidavit as being a list of telephone numbers and cities. The Government argued that production of this investigatory report compiled for law enforcement purposes would constitute an unwarranted invasion of personal privacy under subsection (b)(7)(C). In agreeing that the document as described in the affidavit was exempt

from production, our Court wrote, "Kimberlin's self-serving assertions of government wrongdoing and coverup do not rise to the level justifying disclosure." *Id.* at 208. So there were suggestions of Government wrongdoing present in *Kimberlin*, but mere "suggestions of wrongdoing" were insufficient to require remand for *in camera* review. Rather, there must be *evidence* of bad faith. As the District of Columbia Circuit has likewise held, "[T]he mere allegation of bad faith does not undermine the sufficiency of agency submissions. There must be tangible evidence of bad faith; without it the court should not question the veracity of agency submissions." *Carter*, 830 F.2d at 393. Here, as in *Kimberlin*, if Silets can only *allege* bad faith without any supporting evidence, it cannot be an abuse of discretion to deny *in camera* review.

Moreover, to carve an exception to the *Kimberlin* rule for cases alleging Government wrongdoing would flood the district courts with needless work. If we were to require only an *assertion* of bad faith as opposed to *evidence* of bad faith, we would send a signal flare to all future litigants to make certain to allege Government misconduct no matter how unsupported the allegation. District courts would feel obligated to conduct *in camera* review in nearly every FOIA case, because nearly every FOIA request would be accompanied by the talismanic buzz words "Government wrongdoing." *In camera* review under FOIA is discretionary by its terms and should be invoked only when the exemption issue before the district court cannot otherwise be resolved. *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). The net result of requiring *in camera* review in this case would be that *in camera* review would no longer be left to the discretion of the district courts because our holding would require such review in almost all FOIA cases. Accordingly, we decline to carve an exception to the *Kimberlin* rule.

Because the Government's affidavits adequately explain the redacted material, the information logically fits within the claimed exemptions, and there exists no contrary evi-

dence or evidence of bad faith, the District Court did not abuse its discretion in denying *in camera* review.[2] The opinion of the District Court is AFFIRMED.

---

[2] Silets also argues that, even without *in camera* review, the various redacted information is not exempt from disclosure. "A reviewing court has two duties when reviewing the district court's determination of a FOIA request. First, it must determine if the district court had an adequate factual basis for the decision rendered. If there was such a basis, the reviewing court must decide if the decision made was clearly erroneous." *Antonelli*, 739 F.2d at 303. Our discussion above has already implicitly rejected this argument, because the *Antonelli* analysis is subsumed into the *Kimberlin* rule. In other words, if there were an insufficient factual basis for a decision that material was exempt from disclosure, or if such a decision were clearly erroneous, then information withheld as described in Government affidavits could not logically fall within a claimed exemption, and denial of *in camera* review would be an abuse of discretion under *Kimberlin*. *Cf. Vaughn v. United States*, No. 90-1848 (6th Cir. June 21, 1991) (WESTLAW, Cta database) (That a district court abused its discretion in failing to conduct *in camera* review is the same as saying the court did not have an adequate factual basis for its determination.); *Local No. 3, Int'l Brotherhood of Elec. Workers v. National Labor Relations Bd.*, 845 F.2d 1177, 1180 (2d Cir. 1988) (Where the agency's affidavits provide a sufficient basis for concluding an exception applies, *in camera* review is unnecessary.); *Lewis*, 823 F.2d at 378-79 (analyzing the denial of *in camera* review as a question of whether an adequate factual basis supports the district court's order); *Doherty*, 775 F.2d at 51-52 (same); *Center for Auto Safety v. Environmental Protection Agency*, 731 F.2d 16, 22-23 (D.C. Cir. 1984) (Only if the Government's uncontroverted affidavits provide an adequate factual basis that an exception applies is it appropriate to deny *in camera* review.).

Silets' final beef is that the DOJ failed to supply records that were allegedly attached to other documents that were released in unredacted form. The DOJ claims it cannot verify whether any attachments exist, much less locate them. The DOJ's affidavit details its efforts to find these additional documents and adequately supports the District Court's finding that any attachments could not be located.

CUDAHY, *Circuit Judge*, with whom CUMMINGS, *Circuit Judge*, joins, dissenting.

This is by no means a simple case controlled by *Kimberlin v. Department of Treasury*, 774 F.2d 204 (7th Cir. 1985). Instead, the case before us involves a graduate thesis—and later a book—about Department of Justice efforts to "get" Jimmy Hoffa in the early 1960's. That the federal government—zealous to root out corruption and the influence of organized crime in the labor movement—may have resorted to illegal surveillance in its investigation of the Teamsters Union and of Hoffa, its president, has been broadly suspected for almost thirty years. Rumor and speculation are still with us even though the events themselves are now so stale that possible risks to sources, informants and the like seem increasingly remote.

The majority opinion suggests that what we have here is a mere *assertion* of government bad faith as opposed to *evidence* of bad faith. I think neither of these categories is appropriate: what we have here are widely held and enduring suspicions that the government may have reason to cover up its actions of three decades ago. Certainly, rumors and suspicion are not equivalent to specific and demonstrable knowledge, but we need not hide our heads in the sand either. We need not be so naive as to completely overlook obvious government motives to withhold information.

And, in any event, we have no basis for viewing this case as remotely comparable to the efforts of Brett Kimberlin, who was convicted, *inter alia*, of bombings in Speedway, Indiana. As a result, Kimberlin conducted a huge volume of litigation against numerous defendants including the Secretary of the Treasury under the Freedom of Information Act (FOIA), to obtain documents from the Bureau of Alcohol, Tobacco and Firearms.[1] Kimberlin was,

[1] Kimberlin's lawsuits occupied 42 separate docket numbers in this appellate court and averaged two appeals per year over the course of a decade. *See United States v. Kimberlin*, 898 F.2d 1262, 1264 (7th Cir.), *cert. denied*, 111 S. Ct. 434 (1990).

of course, seeking discovery in his own criminal cases, and we found under exemption (b)(7)(C) that the record failed "to reflect any benefit which would accrue to the public from disclosure" of documents. *Kimberlin*, 774 F.2d at 208. We also found that "Kimberlin's self-serving assertions of government wrongdoing and coverup do not rise to the level justifying disclosure." *Id.* In *Kimberlin*, unlike the present case, there was no broad public interest in disclosure and no longstanding and broadly held suspicions of government coverup.

Moreover, the number of documents requested by Kimberlin was appreciably larger than that requested here. Kimberlin sought disclosure of sixty-four pages of withheld documents in their entirety; in contrast, Silets requests review of only the redacted portions of ten documents, totalling some twenty pages. (At oral argument, Silets represented that only 3-4 pages would be reviewed.)[2]

Finally, the petitioner in *Kimberlin* never requested *in camera* review by the court, as this court saw fit to note. *Kimberlin*, 774 F.2d at 210. Without such a request the judge enjoys even wider discretion, for it is reasonable to believe that the petitioner thought *in camera* review would not have produced any further disclosures.

The redacted portions of the documents at issue in the case before us are neither as innocuous nor as clearly exempt from FOIA as the majority seems to assume. The first set of withheld materials—those withheld to protect the privacy of third parties—includes information regarding the government's surveillance of several individuals as well as a list of cases remanded pursuant to *Alder-*

---

[2] There is simply no basis for the majority's suggestion that *in camera* review in this case would be more work than would have been required in *Kimberlin*. The sixty-four pages of documents requested by Kimberlin would not "stand or fall together," but would have required careful review for a determination of whether each, in its entirety, fell within an exemption. Indeed, that is the very point of *in camera* review.

man v. United States, 394 U.S. 165 (1969).[3] Under this claimed exemption, a district court must " 'balanc[e] the privacy interest at stake against the public interest in disclosure.' " *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987) (quoting *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 486 (D.C. Cir. 1980)). Where the public interest is great, *in camera* review is often the only way of ensuring that there is a sufficiently strong privacy interest on the other side, as well as simply ensuring that the deleted material is in fact what the government claims it to be. The need for *in camera* review to make this determination is particularly strong in a case, such as this one, in which the documents are over two decades old, since many of the individuals ostensibly protected by this exemption have likely "waived their privacy interests through death or public disclosure." *Diamond v. FBI*, 707 F.2d 75, 77 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984).

Moreover, it appears that more material has been redacted from some of the documents in this category than would be necessary to preserve any privacy of third parties. For example, in two interagency memoranda on the subject of "electronic surveillance," not only have the parties' identities been redacted, but all the background information regarding the government's surveillance of parties other than Hoffa has also been deleted.

The second class of redacted material comprises nearly a page of a four-page memorandum and is claimed to involve a witness's testimony before a grand jury. Again, however, the district court's *de novo* determination as to whether this exemption applies is no simple matter. Information regarding a grand jury is not automatically exempt from disclosure; the exemption applies only if disclosure would "tend to reveal some secret aspect of the

---

[3] *Alderman* held that the products of illegal surveillance are inadmissible in a criminal trial and that the government must disclose the records of such surveillance to the defendant.

grand jury's investigation." *Senate of Puerto Rico*, 823 F.2d at 582. Reviewing the deleted material *in camera* is the only way the judge could effectively determine whether the entire redaction falls within this exemption.

The final set of withheld material is asserted to include symbol numbers used by the FBI to identify confidential sources. While two documents in this category contain only two or three minor redactions, one document contains numerous redactions. Reviewing these documents to ensure that all the deletions are in fact informant symbols would not be very burdensome, and would certainly be justified in light of the people's interest in knowing "what their government is up to." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

"The Freedom of Information Act sets forth a policy of broad disclosure of Government documents in order 'to ensure an informed citizenry, vital to the functioning of a democratic society.' " *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The information request in this case strikes at the core of FOIA's purpose, involving matters of public importance and implicating the principle of self-government. Since potentially illegal activity of the government is itself the subject of the investigation, an *in camera* review may be crucial to an objective decision as to the proper disclosure required by FOIA. It is ironic that the majority relies on *Kimberlin*—a case in which the petitioner was essentially seeking extended criminal discovery for his convictions—in finding *in camera* review unnecessary in a case involving information of national and historical significance.

In camera review under FOIA must remain firmly in the discretion of the district court. But this discretion is not unbounded, and where, as here, the administrative hassles are small and the potential public benefits great,

the district court should not dismiss an *in camera* request without reviewing the small number of claimed exemptions for itself.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

U.S. Department of Justice
Office of Legal Policy
Office of Information and Privacy

Washington, D.C. 20530

June 30, 1988

Jack S. Craven, Esq.
Silets and Martin, Ltd.
The Marquette Building
140 South Dearborn Street
Fiifteenth Floor
Chicago, IL 60603

Re: Appeal No. 88-0606
RLH:TJM:RAC

Dear Mr. Craven:

You appealed on behalf of your client, H.L. Silets, from the action of the Criminal Division on his request for access to records pertaining to certain named individuals.

As a result of discussions between Criminal Division personnel and members of my staff, a supplemental release of records either has been or will soon be made to you directly by the Criminal Division. In addition, I have decided to remand Mr. Silets' request to the Criminal Division for further processing in order to determine whether any materials which pertain to individuals, listed in your request but not addressed in the Criminal Division's February 26, 1988 letter, can be located. In light of this fact and after careful consideration of your appeal, I have otherwise decided to affirm the action in this case. Certain information was properly withheld from your client pursuant to 5 U.S.C. §552(b)(3), (5), (6), (7)(A) and (7)(C). These provisions pertain to material exempted from release by statute, in this instance Rule 6(e) to the Federal Rules of Criminal Procedure which pertains to the secrecy

of grand jury proceedings, to certain inter-and intra-agency communications protected by the attorney work-product privilege, to materials the release of which would constitute a clearly unwarranted invasion of the personal privacy of a third party and to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings and to constitute an unwarranted invasion of the personal privacy of third parties. Only records pertaining to Allen Dorfman have been withheld on the basis of 5 U.S.C. §552(b)(7)(A). None of the information being withheld is appropriate for discretionary release.

Judicial review of my action on this appeal is available to your client in the United States District Court for the judicial district in which he resides or has his principal place of business, or in the District of Columbia, which is also where the records sought are located.

Sincerely,

Richard L. Huff, Co-Director
Office of Information and Privacy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT	)	
OF JUSTICE,	)	
Defendant.	)	

ORDER

This case is dismissed with leave to reinstate or substitute this order with any stipulation or draft order of dismissal by January 3, 1989.

Dated: December 2, 1988

MARVIN E. ASPEN
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT	)	
OF JUSTICE,	)	
Defendant.	)	

ORDER

Plaintiff's motion to reinstate is entered and continued to January 17, 1989, at 9:30 a.m.

Dated: December 20, 1988 MARVIN E. ASPEN
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

ORDER

Plaintiff's Motion for Production of Documents and In Camera Review of Documents is denied.

Plaintiff's motion essentially charges that (1) the Department of Justice and the FBI have failed to establish the legal factual validity of the FOIA exemptions claimed, (2) the exemptions asserted are not applicable because the government's surveillances were unlawful, and (3) certain exemptions are incorrectly asserted. In response to plaintiff's motion, the government submitted the affidavits of Messrs. L. Jeffrey Ross and Angus B. Llewellyn, Assistant Director of the Office of Enforcement Operations of the Criminal Division of Department of Justice and FBI Special Agent, respectively. These affidavits establish that the information withheld from disclosure was (1) outside the scope of plaintiff's FOIA requests; (2) internal FBI informant symbol numbers and codes disclosure of which might otherwise prejudice FBI effectiveness in conducting investigations; (3) suspects in FBI criminal investigations disclosing the identity of which might subject such

persons to unwarranted invasions of personal privacy and public opprobrium or criticism; (4) personal information such as name and address of persons whose identity was not requested by plaintiff; and (5) federal grand jury witness information disclosure of which is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure. These affidavits adequately describe the withheld documents, explain the justification for non-disclosure, and demonstrate that the withheld information falls logically within all or at least one of the several exemptions asserted with respect to a particular document or item. Accordingly, plaintiff's motion is denied.

So Ordered.

Dated: September 6, 1989

W. THOMAS ROSEMOND, JR.
U.S. MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

ORDER

Plaintiff's Motion for Affidavit is denied as moot. The magistrate finds that the two affidavits attached to the Response to Plaintiff's Motion for Production and In Camera Review of Documents sufficiently respond to plaintiff's concerns.

Dated: September 6, 1989

W. THOMAS ROSEMOND, JR.
U.S. MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

ORDER

The motions to reconsider filed by plaintiff's counsel are denied. All matters relating to the referral of this action have been resolved, the case is returned to the assigned judge for further proceedings.

Dated: September 6, 1989

W. THOMAS ROSEMOND, JR.
U.S. MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

ORDER

Plaintiff's objections to Magistrate W. Thomas Rosemond, Jr.'s recommendation of September 6, 1989, are overruled.

Dated: November 15, 1989 MARVIN E. ASPEN
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

ORDER

Status hearing held. Case dismissed.

Dated: November 17, 1989 MARVIN E. ASPEN
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

DECLARATION OF L. JEFFREY ROSS

I, L. Jeffrey Ross, declare the following to be true and correct:

(1) I am an attorney in the Office of Enforcement Operations of the Criminal Division of the Department of Justice. My specific assignment at the present time is Assistant Director of the Office of Enforcement Operations.

(2) In such capacity, my duties are, *inter alia*: to act as liaison with other Divisions and Offices of the Department of Justice in responding to requests made under both the Freedom of Information Act (5 U.S.C. § 552 (1982 & Supp. II 1984) *amended by* Pub. L. No. 99-570 §§ 1801-1804 (Oct. 27, 1986)), and the Privacy Act of 1974 (5 U.S.C. 552a); to receive requests under these Acts which are referred to the Criminal Division by the Administrative Programs Unit of the Justice Management Division and other units of the Department; to supervise the search, location of records, the preparation of re-

sponses of the Criminal Division; to assure that determinations to withhold or to release records of the Criminal Division are in accordance with the provisions of both the Freedom of Information Act and Privacy Act, and the Department of Justice regulations implementing these Acts (28 C.F.R. 16.1 *et seq.* and 28 C.F.R. 16.40 *et seq.*); and to maintain copies of correspondence related to requests which have been assigned to the Criminal Division for determination and response. As Assistant Director, I have been delegated authority to deny or release records requested under the Freedom of Information Act and the Privacy Act.

(3) The statements made herein, I declare on the basis of knowledge acquired through the performance of my official duties.

(4) By Motion dated May 23, 1989, plaintiff filed, as Exhibit 1, a list of eleven documents for which plaintiff seeks an *in camera* review. Plaintiff also seeks a sworn statement describing the search of Department of Justice files for memoranda which were not located as a result of his earlier requests. The purpose of this declaration is twofold, first, to describe those Criminal Division documents listed in plaintiff's Exhibit 1 and describe the FOIA exemptions applied to portions of each, and second, to describe the Criminal Division's search for the memoranda about which plaintiff is inquiring. Portions of the following items (1, 6, 8, 9, 10, 11) on plaintiff's Exhibit 1 are being withheld by the Criminal Division. For the convenience of the court, I am attaching a copy of each (as released to plaintiff) to this declaration. Items 2, 3, 4, and 5 originated with the Federal Bureau of Investigation (FBI), and it is my understanding that the FBI will, or has, filed a declaration describing these items.

(5) Plaintiff's item 1 (Exhibit 1), which I am withholding in part, is a two page memorandum, captioned "Cases remanded for hearings pursuant to Alderman," dated April 18, 1969, from Will Wilson, Assistant Attorney General, Criminal Division to the Attorney General. The item is comprised of a list of individual cases not related to each other except that each was remanded pursuant to a United States Supreme Court decision. Only one case, number 9 on the list, concerned the subject of plaintiff's request. All other information is information which plaintiff did not request, as it, in no way, deal with the individuals, or subject matter, which form the basis of this litigation. In addition, the information I am withholding in this document currently is classified "Secret." The Criminal Division reviewed the document to determine if the information in it could be declassified. Upon review by the Criminal Division Declassification Unit, that Unit determined that only the information responsive to plaintiff's request was appropriate for declassification, and that all remaining information properly was classified at the "Secret" level and should not be declassified.

Accordingly, I am withholding the balance of the material in this item both as it is outside the scope of plaintiff's request and litigation, and as it is exempt from disclosure pursuant to the FOIA exemption contained in 5 U.S.C. 552(b)(1) which protects from disclosure national security information properly classified in accordance with the substantive and procedural requirements of an executive order. The applicable executive order is Executive Order No. 12,356, 3 C.F.R. page 166 (1982 Comp.)

In addition, the information withheld consists of the names and personal identities concerning individuals who are not the subject of plaintiff's request. I am withholding this personal information pursuant to the FOIA exemp-

tions found at 5 U.S.C. 552(b)(6) which permits the withholding of personal information in files where disclosure would constitute a "clearly unwarranted invasion of privacy," and 5 U.S.C. 552(b)(7)(C) which permits the withholding of personal information in law enforcement files where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In applying both of these exemptions, one must balance the public interest in disclosure against the privacy interest of the individuals about whom the information was compiled. In this case, I can see *no* public interest in the disclosure of these individuals. In the first place, none of these individuals are those about whom plaintiff requested. (I released the one paragraph in this item which does pertain to plaintiff's request) On the other hand, there is a significant privacy interest in not having your name attributed to criminal law enforcement files. On balance then, I felt the privacy rights exceeded the nonexistent public interest in this case, and am withholding the information, as well, pursuant to 5 U.S.C. 552(b)(6) and (7)(C).

6. Plaintiff's item 6 (Exhibit 2), which I am withholding in part, is a two page memorandum from Michael Epstein, Staff Assistant, Criminal Division, to Will Wilson, Assistant Attorney General, Criminal Division, dated April 15, 1969. In this item, I am withholding only the identity, and identifying information, of a third party, whose name is not among those requested by plaintiff, nor at issue in this litigation. Again, I can see no public interest to be satisfied by identifying this third party whose name is, in no way, involved in this litigation, and I am asserting 5 U.S.C. 552(b)(6) and (7)(C), as described above.

7. Plaintiff's item 8 (Exhibit 3), which I am withholding in part, is a two page memorandum, dated December 5, 1966, from Fred Vinson, Jr., Assistant Attorney General,

Criminal Division, captioned Electronic Surveillance, with a two page attachment of individuals for whom electronic surveillance information was sought. We released all information within the scope of plaintiff's request in full. That information is found on the last page of this item. The *only* information withheld is that of the names and identifying information of individuals *not* requested by plaintiff. Those individuals fall outside the ambit of plaintiff's request, and in my opinion, this litigation. Alternatively, these non-responsive third party names are exempt from FOIA disclosure pursuant to 5 U.S.C. 552(b)(6) and (7)(C), as described above, which protects records in files and in law enforcement files where disclosure would constitute either a clearly unwarranted, or an unwarranted invasion of privacy. Since plaintiff has not sought access to these names, and since I can see no public interest which outweighs the privacy interest of those individuals in this case, the balance falls on the side of withholding.

8. Plaintiff's item 9 (Exhibit 4), which I am withholding in part, is a one page letter from a private citizen, dated January 8, 1968, for the Attorney General, seeking information concerning electronic surveillance in the trial of Jimmy Hoffa and his associates. Here again, and for the same reasons described above, the only information I withheld from plaintiff is third party, personal identifying information, whose disclosure would serve no discernible public interest, and in which plaintiff himself has evinced no interest. I withheld this pursuant to 5 U.S.C. 552(b)(6) and (7)(C), as described above.

9. Plaintiff's item 10 (Exhibit 5), which I am withholding in part, is the January 26, 1968, response from the Assistant Attorney General, Criminal Division to the inquiry of the private citizen. Here again, the only information withheld is personal information of a private citizen

who wrote to the Department of Justice, and whose identity was not requested by plaintiff. I withheld this information pursuant to 5 U.S.C. 552(b)(6) and (7)(C), as discussed above.

10. Plaintiff's item 11 (Exhibit 6), which I am withholding in part, is a four page memorandum, captioned Bernard J. Spindel, Jacques M. Schiffer, Unauthorized Publication or Use of Communications, from L. Scalzo to Henry Petersen, Deputy Chief, Organized Crime and Racketeering Section, dated May 6, 1965. The only information I withheld in this item is a portion of page three which identifies the name of a witness before a grand jury, a discussion of the witness' testimony and other aspects of the witness' appearance before that Federal grand jury. I withheld this information pursuant to the exemption contained in 5 U.S.C. 552(b)(3) which permits the withholding of information prohibited from disclosure by another statute. The statute in this case is Rule 6(e) of the Federal Rules of Criminal Procedure which has been found to be a statute within the ambit of 5 U.S.C. 552(b)(3). Rule 6(e) prohibits the disclosure of matters occurring before a grand jury except in circumstances not present here and treats such disclosure as a contempt. The information withheld, in my opinion, clearly reveals matter occurring before a grand jury and, in my opinion, I am prohibited from releasing this material by Rule 6(e) of the Federal Rules of Criminal Procedure.

11. By Motion captioned "Plaintiff's Motion for Affidavit," and dated May 23, 1989, plaintiff cites the release of an October 9, 1968, memorandum which discusses memoranda authored by Michael Epstein not located by the Criminal Division and seeks "a fuller, sworn explanation of the efforts undertaken by the DOJ to fulfill their obligations under the Freedom of Information Act to locate

and disclose [these Epstein memoranda] and, if appropriate, a sworn statement that the documents cannot be located." In response to plaintiff's previous inquiry with regard to the missing Epstein memoranda, the Criminal Division ordered, and reviewed, all file sections indexed under the number 177-012 (the file section from which we extracted the October 9, 1968, memorandum), and did not locate any further documents pertaining to plaintiff's request or litigation. Further, we had released previously to plaintiff an Epstein memorandum dated April 15, 1969 (Exhibit 2 of this declaration), which logically *should* contain all the information located in prior Epstein memoranda on this subject. The April 15, 1969, Epstein memorandum also contained a Department of Justice file reference, # 156-71-10, which we likewise ordered and reviewed, but failed to locate any additional records within the ambit of plaintiff's request or litigation.

By letter dated April 3, 1989 (Exhibit 7), the Office of the United States Attorney for the Northern District of Illinois wrote plaintiff's counsel, explaining the results of the Criminal Division searches described above, and concluding that "if such [Epstein] documents ever existed, they cannot now be located, despite the considerable time and effort expended by the Department of Justice in this matter."

12. Plaintiff's item 7 (Exhibit 8) is a one page memorandum, dated April 20, 1965, captioned FBI Investigation—Bernard B. Spindel. As plaintiff acknowledges in his filing, the Criminal Division did not withhold any portion of this item. Plaintiff complains that we did not release any attachment to the memorandum, although the word attachment appears. As a result of plaintiff's filing, I re-ordered file # 82-51-81, the file in which this memorandum is located (file # 82-70-29 having been merged into this file,

and its notation having been crossed off Exhibit 8) and personally reviewed it. Having reviewed each item in that file, I can state that whatever may or may not have been attached to that memorandum in 1965, is no longer there. Further, the Criminal Division has identified all Criminal Division documents located in that file, and released them to plaintiff in full or in part by its prior responses.

The Criminal Division has pursued all logical avenues to try to locate any additional records within the ambit of plaintiff's request. On information and belief, the Criminal Division has identified all documents to plaintiff within the scope of his request, and is not withholding any additional records or information about which this litigation is premised. To the extent that earlier Epstein memoranda did exist, or that a background file was attached to Exhibit 8, we are unable to locate them in Criminal Division files.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on: July 19, 1989

/s/ L. JEFFREY ROSS
L. JEFFREY ROSS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HAYDEN LEIGH SILETS,	)	
	)	
Plaintiff,	)	
v.	)	No. 88 C 7343
	)	Hon. Marvin E. Aspen
	)	Magistrate Rosemond
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	

DECLARATION OF ANGUS B. LLEWELLYN

I, Angus B. Llewellyn, hereby declare as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), employed in a supervisory capacity in the Freedom of Information-Privacy Acts (FOIPA) Section of the Records Management Division at FBI Headquarters, Washington, D.C. The statements contained in this declaration are based upon personal knowledge and upon information obtained during the performance of my official duties.

(2) Four documents were referred to the FBI by the Criminal Division, USDOJ, to explain and justify the Freedom of Information Act (FOIA) (Title 5, United States Code (USC), Section 552) exemptions claimed by the FBI. This declaration is to provide the Court with explanations of the exemptions claimed.

(3) The following explanations are made to assist the Court in reviewing the four FBI documents.

(a) The four documents at issue in this litigation which pertain to the FBI are Documents two through five as shown in plaintiff's Exhibit I dated June 23, 1989. The documents being submitted herewith bear the document number in the lower right hand corner of the first page of the document. This number is in agreement with the number shown on Exhibit I of the plaintiff's declaration.

(b) Documents Two, Three and Four are FBI originated documents. Document Five is a DOJ, Criminal Division, letter which contains FBI information.

(c) The plaintiff's FOIA request pertains to Alan Dorfman, Judge Frank W. Wilson, Walter Sheridan, James C. Haggerty, Bernard Spindel, Jacques Schiffer, Cecil Branstetter, Nicholas J. Tweel, Edward Grady Partin, Thomas Ewing Parks, Larry Campbell, Ewing King, Harry Berke, Sr., Harry Berke, Jr., Frederick Michael Shobe, Carl Fields and James C. Tippens, all of whom the plaintiff believed were involved in the James R. Hoffa trial in Chattanooga, Tennessee. Six of the ten pages on which exemptions (b)(2) and (b)(7)(C) were asserted to withhold information pertain to the individuals identified in the plaintiff's request. The four remaining pages were outside the scope of plaintiff's request inasmuch as they relate entirely to persons other than the individuals mentioned in plaintiff's request to the USDOJ and FBI dated July 26, 1984.

(d) FBI material has been withheld pursuant to certain exemptions allowed by the FOIA, as described more fully below:

A. *(b)(2) SYMBOLS USED TO CONCEAL THE IDENTITIES OF FBI SOURCES AND METHODS*

(4) Title 5, U.S.C., Section 552 (b)(2) exempts from disclosure material "relating solely to the internal person-

nel rules and practices of an agency." The exemption protects routine internal administrative matters and functions of the FBI which have no significant affect on the public at large.

Informant Symbol Numbers
(Human or Technical)-(b)(2)

(5) Exemption (b)(2) was utilized to delete FBI symbol numbers which are used internally by the FBI to identify confidential sources regardless of the type of source (human or technical). These are assigned as an administrative aid to facilitate the flow of internal agency correspondence concerning information received from a source or technique.

(6) Disclosure of this type of information could permit an individual using a "mosaic" approach to analyze piecemeal data and eventually assemble enough material to identify FBI sources of information or compromise the use of the investigative technique, thus negating their future use by the FBI, and hampering the FBI's ability to recruit informants in future cases. First, the letters and numbers which comprise a symbol number have independent significance and meaning. For example, each symbol number has two prefix letters which identify the particular FBI field office where the source is located and the sequentially assigned informant number can reveal the extent of the informant program in each field office. Second, the disclosure of a symbol number should not be viewed in isolation. If the particular symbol number is released to the public at various times and in the context of various documents, this could ultimately lead to the identification of the source. Each new context in which the symbol number is disclosed reveals additional information such as dates, times and places from which the

identity of an FBI source can be deduced. Releasing symbol numbers related to technical sources would eventually, through a process of elimination, reveal the source symbol numbers used for living informants. Exemption (b)(2) is often asserted in conjunction with the (b)(7)(D) exemption to protect source symbol numbers.

Informant Symbols—T-Symbol Numbers

(7) Pages three, four and five of Document Two, which were withheld in their entirety, contain information attributed to T-symbols (temporary source identification number). T-symbols are used in inter- or intra-office communications to designate the source of information without revealing an informant's own symbol number. From the viewpoint of a mosaic analysis, however, T-symbol designators can be as revealing as an actual source symbol number. The release to requesters of the symbol numbers may permit the requesters to piece together information and identify sources. The deletion of the T-symbol is essential to guard against the accumulations of information known to be from the same source. Again, this exemption is often asserted in conjunction with the (b)(7)(D) exemption.

(B) (b)(7)(C) UNWARRANTED INVASION OF PERSONAL PRIVACY

(8) Title 5, U.S.C., Section 552, subsection (b)(7)(C), sets forth an exemption for records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

IDENTITIES OF FBI PERSONNEL-(b)(7)(C)

(9) Exemption (b)(7)(C) was asserted to protect the identities of FBI Agents responsible for conducting and/or supervising the investigative activities reported in Document Number 2. The names of FBI Agents which appear in the document at issue were withheld because their assignment to an investigation is not by choice, and publicity (adverse or otherwise) regarding any particular investigation may seriously prejudice their effectiveness in conducting other investigations. The privacy consideration offered by exemption (b)(7)(C) also protects FBI Agents, as individuals, from unnecessary, unofficial questioning as to the conduct of an investigation. FBI Agents conduct official inquiries into violations of various criminal statutes and in national security cases. They conduct searches and make arrests, both of which constitute reasonable, but nonetheless serious, intrusions into people's lives. Many of these people carry grudges which last for years and seek any excuse to harass the responsible Agent. The publicity associated with release of an FBI Agent's name in connection with a particular law enforcement investigation could rekindle animosity toward that Agent. Furthermore, there is no public interest to be served by placing before the public the individual names of the Agents involved in the records concerning the plaintiff.

THIRD PARTIES WHO ARE SUBJECTS OR SUSPECTS OF FBI INVESTIGATIVE FILES-(b)(7)(C)

(10) Exemption (b)(7)(C) was also utilized to protect from disclosure the identities of third parties who were of investigative interest to the FBI, as well as information about those persons that was determined to be per-

sonal, intimate, derogatory, or otherwise revealing in nature.

(11) The FBI often develops substantial amounts of information during the course of a criminal investigation of an individual or organization. Such information includes background information about the subjects or suspects and information regarding their involvement in possible criminal activities. In an investigation involving an organization, information is often collected concerning individuals known or suspected to be associates or members of the organization. Such individuals are of investigative interest to the FBI as possible suspects or subjects of criminal matters, potential witnesses to criminal activity, or as sources of information.

(12) Disclosure of the identities of these subjects or suspects would most certainly result in an unwarranted invasion of their personal privacy and might subject them to unnecessary public attention, harassment or criticism. In accordance with the Privacy Act of 1974, the FBI cannot disseminate information gathered during the course of an investigation to persons not legally entitled to receive such information.

(13) Should the Court determine that any of the material deemed outside the scope by the FBI is responsive to the plaintiff's request and should be released, the FBI respectfully requests the opportunity to process it for applicable exemptions.

(14) The information contained in this declaration constitutes a complete and accurate itemization of the documents pertaining to plaintiff's FOIA request. For each document or portion of a document withheld, justifications have been cited pursuant to exemptions contained in the

FOIA. There are no additional reasonably segregable portion of any of the withheld material which can be released.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 1989.

/s/ ANGUS B. LLEWELLYN
Angus B. Llewellyn
Special Agent Federal Bureau
of Investigation
Washington, D.C.

(2)

No. 91-1133

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAYDEN LEIGH SILETS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

LEONARD SCHAITMAN
BRUCE G. FORREST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in this action under the Freedom of Information Act to compel disclosure of agency records, the district court abused its discretion by ruling on the validity of the agency's decision to withhold information from certain documents without inspecting the disputed documents *in camera*.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Barney v. *Internal Revenue Service*, 618 F.2d 1268 (8th Cir. 1980)	8
Center for Auto Safety v. *EPA*, 731 F.2d 16 (D.C. Cir. 1984)	8, 11
Davis v. *Central Intelligence Agency*, 711 F.2d 858 (8th Cir. 1983), cert. denied, 465 U.S. 1035 (1984)	8
Doherty v. *United States Dep't of Justice*, 775 F.2d 49 (2d Cir. 1985)	8
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973)	11
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	2
Kimberlin v. *Department of the Treasury*, 774 F.2d 204 (7th Cir. 1985)	4, 8
Lam Lek Chong v. *United States Drug Enforcement Admin.*, 929 F.2d 729 (D.C. Cir. 1991)	8
Lame v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981)	8
Lewis v. *Internal Revenue Serv.*, 823 F.2d 375 (9th Cir. 1987)	8
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)	7
Raven v. *Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), cert. denied, 440 U.S. 980 (1979)	8
Senate of Puerto Rico v. *United States Dep't of Justice*, 823 F.2d 574 (D.C. Cir. 1987)	5

Cases—Continued: Page

Stein v. *Dep't of Justice*, 662 F.2d 1245 (7th Cir. 1981) 4
United States Dep't of State v. *Ray*, 112 S. Ct. 541 (1991) 10
Vaughn v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 2
Vaughn v. *United States*, 936 F.2d 862 (6th Cir. 1991) 8
Wiener v. *Federal Bureau of Investigation*, 943 F.2d 972 (9th Cir. 1991) 7

Statutes and rule:

Freedom of Information Act:
5 U.S.C. 552 2
5 U.S.C. 552(a)(4)(B) 2, 7
5 U.S.C. 552(b) 2
5 U.S.C. 552(b)(2) 6
5 U.S.C. 552(b)(3) 5
5 U.S.C. 552(b)(7)(C) 5
5 U.S.C. 552(b)(7)(D) 6
Fed. R. Crim. P. 6(e) 5

Miscellaneous:

S. Rep. No. 854, 93d Cong., 2d Sess. (1974) 7
S. Rep. No. 813, 89th Cong., 1st Sess. (1965) 11

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1133

HAYDEN LEIGH SILETS, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 945 F.2d 227. The orders of the district court dismissing the action (Pet. App. 17) and overruling petitioner's objections to the magistrate's recommended decision (Pet. App. 23) are unreported. The orders of the magistrate denying petitioner's Motion for Production of Documents and In Camera Review of Documents (Pet. App. 19-20) and petitioner's Motion for Affidavit (Pet. App. 21) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1991. The petition for a writ of certiorari was filed on January 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, petitioner asked the U.S. Department of Justice for records relating to the electronic surveillance of Jimmy Hoffa and his associates from 1962 through 1964. The Department complied with petitioner's request, but provided ten of the responsive documents in redacted form. The Department claimed that the redacted information was exempt from disclosure under FOIA, see 5 U.S.C. 552(b). In 1988, petitioner brought this action in the United States District Court for the Northern District of Illinois, seeking to compel disclosure of the withheld information pursuant to 5 U.S.C. 552(a)(4)(B). Pet. App. 1-2; Pet. 14.

In the ensuing litigation, petitioner filed a motion to require the government to submit the disputed documents in unredacted form for *in camera* inspection by the magistrate to whom the case had been referred. NR 26.[1] The government opposed that motion and submitted two "*Vaughn* index"[2] declarations that described the redacted information and explained why the information had been withheld.

---

[1] "NR" refers to the docket entry number assigned by the district court.

[2] The term "*Vaughn* index" is derived from *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The index "usually consists of a detailed affidavit, the purpose of which is to 'permit the court system effectively and efficiently to evaluate the factual nature of disputed information.'" *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn* v. *Rosen*, 484 F.2d at 826).

NR 32; Pet. App. 25-39. One declaration concerned the information that had been withheld by the Criminal Division of the Justice Department; it was prepared by L. Jeffrey Ross, an attorney in the Office of Enforcement Operations of the Criminal Division.[3] The other declaration concerned the information that had been withheld by the FBI; it was prepared by Special Agent Angus Llewellyn, who worked in the Freedom of Information-Privacy Acts Section of the Records Management Division at FBI Headquarters in Washington, D.C.

On September 6, 1989, the magistrate issued a recommended decision in favor of the government, finding that the Ross and Llewellyn declarations justified the government's redactions:

> [T]he information withheld from disclosure was (1) outside the scope of plaintiff's FOIA requests; (2) internal FBI informant symbol numbers and codes disclosure of which might otherwise prejudice FBI effectiveness in conducting investigations; (3) suspects in FBI criminal investigations disclosing the identity of which might subject such persons to unwarranted invasions of personal privacy and public opprobrium or criticism; (4) personal information such as name and address of persons whose identity was not requested by plaintiff; and (5) federal grand jury witness information disclosure of which is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure. These affidavits adequately describe the withheld documents, explain the justification for non-dis-

---

[3] Petitioner's Appendix does not include the redacted documents, which were exhibits to the Ross and Llewellyn declarations. We are lodging a copy of those documents with this response.

> closure, and demonstrate that the withheld information falls logically within all or at least one of the several exemptions asserted with respect to a particular document or item.

Pet. App. 19-20. In a separate order, petitioner's request for *in camera* inspection was denied. NR 35.

2. The district court overruled petitioner's objections to the magistrate's recommended decision, Pet. App. 23, and subsequently dismissed the action, *id.* at 24.

3. The Seventh Circuit, sitting *en banc* on its own motion, affirmed.[4] It held that the district court did not abuse its discretion by refusing to review the disputed documents *in camera*. The Seventh Circuit relied on its prior decision in *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204, 210 (1985), where it held that a district court may rely on government affidavits, without inspecting the disputed documents *in camera*, when the affidavits "(1) describe the withheld documents and the justifications for nondisclosure with reasonably specific detail, (2) demonstrate that the information withheld falls logically within the claimed exemption, and (3) are not controverted by either contrary evidence in the record or by evidence of agency bad faith." Pet. App. 3 (quoting *Kimberlin*, 774 F.2d at 210, and *Stein* v. *Dep't of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981)).

---

[4] Initially, a divided panel of the Seventh Circuit voted to reverse. The dissenting member of that panel contended, in a proposed dissenting opinion, that the proposed majority opinion conflicted with the Seventh Circuit's prior decision in *Kimberlin* v. *Department of the Treasury*, 774 F.2d 204 (1985). The proposed panel opinion was circulated to all active members of the Seventh Circuit, which voted to consider the case *en banc*. Pet. App. 2 n.1.

The court determined that the Ross and Llewellyn declarations satisfied the *Kimberlin* criteria with respect to each of the three classes of information at issue.

The first class of withheld information "concern[ed] information withheld to protect third parties," Pet. App. 4; it consisted primarily of the names of individuals who had been wiretapped by the FBI or who were mentioned in FBI documents describing surveillance of Hoffa, *ibid.* The court held that this information, as described in the government's declarations, "logically f[e]ll[] within" FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which exempts from disclosure "records or information compiled for law enforcement purposes * * * to the extent that the production * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The second class of information consisted of "the identity of a witness before a grand jury and a discussion of that witness' testimony." Pet. App. 5. The government withheld that information under FOIA Exemption 3, which shields matters that are "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). The court determined that the government's affidavits demonstrated that the second class of information fell "squarely within" FOIA Exemption 3, because its disclosure was prohibited under Rule 6(e) of the Federal Rules of Criminal Procedure. Pet. App. 5-6.[5]

Finally, the court held that the government's affidavits were sufficient to justify withholding the third class of information—"symbol numbers used inter-

---

[5] The court of appeals held that Rule 6(e) is a "statute" for purposes of Exemption 3. Pet. App. 5 (citing *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 582 n.23 (D.C. Cir. 1987)).

nally by the FBI to identify confidential sources," Pet. App. 6—under both Exemption 2, which protects from disclosure matters "related solely to the internal personnel rules and practices of an agency" *ibid.* (quoting 5 U.S.C. 552(b)(2)), and Exemption 7(D), which shields law enforcement records or information the disclosure of which "could reasonably be expected to reveal 'the identity of a confidential source . . . which furnished information on a confidential basis,'" Pet. App. 6 (quoting 5 U.S.C. 552(b)(7)(D)). The court found that the FBI affidavit "adequately describe[d] how the disclosure of symbol numbers could lead to the revelation of the sources." Pet. App. 6.

Judge Cudahy (joined by Judge Cummings) dissented. The dissenters would have looked beyond the government's affidavits, and required *in camera* inspection in light of "widely held and enduring suspicions" about the government's conduct in pursuing Jimmy Hoffa. Pet. App. 10. The dissenters also believed that the events described in the documents were "so stale that possible risks to sources, informants and the like seem increasingly remote." *Ibid.*

DISCUSSION

The court of appeals correctly upheld the district court's refusal to inspect the disputed documents *in camera*. That holding fully accords with the discretion accorded to district courts in the text of FOIA and FOIA case law. By contrast, there is no support for petitioner's broad contention that *in camera* inspection is required "in cases where the documents have been found and where the privacy exemptions are involved." Pet. 21. Thus, further review ordinarily would not be warranted.

Nonetheless, we believe that further review of the Seventh Circuit's decision in this case is warranted if, as we have urged, this Court grants our petition for a writ of certiorari filed this day seeking review of the Ninth Circuit's decision in *Wiener* v. *Federal Bureau of Investigation*, 943 F.2d 972 (1991). The Seventh Circuit's decision here and the Ninth Circuit's decision in *Wiener* represent drastically different approaches to appellate review of the manner in which district courts conduct FOIA litigation. Because plenary review in *Wiener*, if granted, will be illuminated by further review in the present case, we do not oppose certiorari.[6]

1. FOIA states that the district courts "*may* examine the contents of [disputed] agency records in camera." 5 U.S.C. 552(a)(4)(B) (emphasis added). "The *in camera* review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved; it thus does not mandate that the documents be individually examined in every case." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).[7]

Consistent with the plain language of FOIA, the court of appeals properly reviewed the district court's refusal to conduct *in camera* review for an abuse of discretion. Pet. App. 2. Under that standard, the court of appeals upheld the district court's ruling, concluding that the government's affidavits " '(1) de-

---

[6] We have provided counsel in this case with a copy of our petition in *Wiener*.

[7] In amending FOIA in 1974 to authorize *in camera* inspection, Congress rejected a proposal to require *in camera* inspection in every case. S. Rep. No. 854, 93d Cong., 2d Sess. 14 (1974).

scribe[d] the withheld documents and the justifications for non-disclosure with reasonably specific detail, (2) demonstrate[d] that the information withheld [fell] logically within the claimed exemption[s], and (3) [we]re not controverted by either contrary evidence in the record or evidence of agency bad faith.' " *Id.* at 3 (quoting *Kimberlin*, 774 F.2d at 210).

Contrary to petitioner's contention (Pet. 20), the Seventh Circuit's approach does not conflict with case law concerning the circumstances under which the district court may rely on government affidavits in lieu of *in camera* inspection. On the contrary, substantially the same approach "[has] been widely adopted in other circuits." *Center for Auto Safety* v. *EPA*, 731 F.2d 16, 22 n.8 (D.C. Cir. 1984).[8]

Petitioner also errs in asserting (Pet. 18-19) that the district court abused its discretion. Petitioner contends that *in camera* review was required because of the age of the documents, the alleged possibility of government wrongdoing in connection with the surveillance of Hoffa, and the small number of documents involved. The age of the documents, however, was clearly indicated in the government's affidavits; thus, assuming *arguendo* that their age was relevant to assessing the government's exemption claims, *in*

---

[8] See *Lam Lek Chong* v. *United States Drug Enforcement Admin.*, 929 F.2d 729, 735 (D.C. Cir. 1991); *Lewis* v. *Internal Revenue Serv.*, 823 F.2d 375, 378-380 (9th Cir. 1987); *Davis* v. *Central Intelligence Agency*, 711 F.2d 858, 860 (8th Cir. 1983), cert. denied, 465 U.S. 1035 (1984); *Doherty* v. *United States Dep't of Justice*, 775 F.2d 49, 51-53 (2d Cir. 1985); *Lame* v. *United States Dep't of Justice*, 654 F.2d 917, 921 (3d Cir. 1981); *Barney* v. *Internal Revenue Serv.*, 618 F.2d 1268, 1272 (8th Cir. 1980); see also *Vaughn* v. *United States*, 936 F.2d 862, 867 (6th Cir. 1991); *Raven* v. *Panama Canal Co.*, 583 F.2d 169, 171-172 (5th Cir. 1978), cert. denied, 440 U.S. 980 (1979).

camera review would not have aided the district court in making that assessment. Petitioner's unsupported allegation of government wrongdoing likewise did not justify *in camera* review. As the court of appeals recognized, a rule requiring *in camera* review based merely upon such allegations "would flood the district courts with needless work." Pet. App. 8. Finally, it is irrelevant that "portions of only ten documents" are at issue. See Pet. 19. As the [c]ourt of appeals correctly observed, "the [d]istrict court, not the [c]ourt of [a]ppeals, is in the best position to evaluate the work involved to determine whether *in camera* review will unreasonably drain the [c]ourt's resources." Pet. App. 7.

2. As we discussed above, the court of appeals applied a three-part test in upholding the district court's reliance on the FBI's *Vaughn* indices. Petitioner separately challenges the "bad faith" component of this inquiry (Pet. 21-25), contending that it conflicts with FOIA provisions that (i) place on an agency the burden of justifying its withholding of information and (ii) require the district court to make a *de novo* determination of whether the information was properly withheld.

Petitioner's challenge is misconceived. It ignores the first two parts of the court of appeals' inquiry. When the government has, by affidavit or declaration, provided a "reasonably specific" description of the documents and shown that they "logically" fall within a FOIA exemption, it has met its burden of proof under FOIA. It is fully consistent with FOIA to require the plaintiff at that point to come forward with evidence to rebut the government's showing. If the plaintiff does not produce such evidence, the district

court is entitled to rely on the government's affidavits to make a *de novo* determination.

At bottom, petitioner's criticism of the court of appeals' approach reflects the view that the government's declarations regarding disputed documents in a FOIA case cannot be trusted. This skepticism collides with the principle that government records and official conduct are "generally accord[ed] * * * a presumption of legitimacy." *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 550 (1991). The court of appeals merely held that a district court does not abuse its discretion in foregoing *in camera* inspection when nothing in the record suggests irregularity. That holding is eminently correct.

3. For reasons discussed above, we believe that the Seventh Circuit's decision in this case would not, standing alone, warrant further review. But that decision does not stand alone. As we have indicated in our petition for certiorari filed today, the Seventh Circuit's decision here and the Ninth Circuit's decision in *Wiener* represent sharply contrasting approaches to the showing that the government must make in order to prevail in a FOIA case. The Seventh Circuit assessed the adequacy of the government's *Vaughn* indices by determining whether they were sufficient to enable the district court to make the *de novo* determination required under FOIA. The Ninth Circuit, on the other hand, has required the maximum level of detail possible in a *Vaughn* index, without regard to whether such detail is necessary for the district court to rule on the claimed exemptions.[9]

---

[9] In *Wiener*, the Ninth Circuit reversed the district court's decision granting summary judgment in favor of the government, based on its determination that the FBI had failed in the *Vaughn* indices to "disclose all it could" about the dis-

This cacophony of voices in the circuits— especially in the highly litigious world of FOIA—should not be allowed to persist.

The Seventh Circuit's approach is the proper one. Most importantly, the Seventh Circuit's approach is faithful to FOIA's text. The Ninth Circuit's approach is not. I. addition, by allowing the district court broad discretion in determining how to develop an adequate factual basis, the Seventh Circuit achieved a " 'workable formula' that 'balances, and protects all interests,' " in accordance with congressional intent. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80 (1973) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). The Ninth Circuit's approach, in contrast, frustrates Congress's purpose to provide for "the fullest *responsible* disclosure," (S. Rep. No. 813, at 3 (emphasis added)), because, in actual operation, it tends to result in the disclosure of exempt information. See *Wiener* Pet. 9, 17-18, 19-20.

We believe that plenary review in *Wiener*, if granted, will be enhanced if the Ninth Circuit's decision is reviewed in connection with the Seventh Circuit's decision in this case. The Seventh Circuit's decision not only reflects an approach similar to that employed in other circuits, see *Center for Auto Safety*, 731 F.2d at 22 n.8, but also involves a typical fact

---

puted documents. *Wiener* Pet. App. 7a. In the Ninth Circuit's view, the "adversarial process is unnecessarily compromised" unless the government's *Vaughn* index discloses "as much information as possible" without revealing the information that is claimed to be exempt. *Ibid.* The Ninth Circuit further held that a district court cannot resort to *in camera* inspection until the government has submitted a *Vaughn* index that satisfies the maximum-detail standard. *Id.* at 7a-8a.

pattern.[10] Of particular relevance, the *Vaughn* indices submitted to the district court below describe the government's withholdings, and explain the justification for those withholdings, in a level of detail comparable to the level of detail used in many other FOIA cases, including *Wiener*.

CONCLUSION

The petition should be granted if the petition for a writ of certiorari in *Federal Bureau of Investigation* v. *Wiener* is granted, and the two cases should be consolidated. Otherwise, the petition should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

LEONARD SCHAITMAN
BRUCE G. FORREST
Attorneys

APRIL 1992

---

[10] The one feature that distinguishes this case from the great majority of other FOIA cases is its unusually small record, consisting of only ten documents in dispute, comprising some 20 pages.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45395